

STATE OF MICHIGAN
COURT OF APPEALS

LINDA MIERZEJEWSKI and RAYMOND
MIERZEJEWSKI,

Plaintiffs-Appellants,

v

TORRE & BRUGLIO, INC.,

Defendant-Appellee.

UNPUBLISHED
September 26, 2006

No. 269599
Oakland Circuit Court
LC No. 2005-064147-NO

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeal as of right the summary dismissal of her slip and fall negligence claim against a snow removal company on the ground that the allegedly dangerous ice was open and obvious.¹ We reverse the dismissal.

This claim arises as a consequence of injuries plaintiff allegedly sustained when she slipped and fell on a patch of ice as she was attempting to walk across the parking lot at work. She brought this negligence action against defendant because defendant was contractually obligated to perform snow maintenance services for that particular property.

Defendant moved to dismiss the matter, pursuant to MCR 2.116(C)(8) and (C)(10), arguing that: (1) it did not owe a legal duty to plaintiff, but; (2) if it did owe a duty to plaintiff, it was relieved of that duty by the open and obvious doctrine. Specifically, defendant argued that its contract with the property owner did not grant any rights to plaintiff, i.e., defendant owed plaintiff no duty that was separate and distinct from its contractual obligations. And, defendant performed its contractual obligations by plowing the snow in the parking lot to the perimeters of the lot, including to the landscaped curbed islands, which presented obvious accumulations of snow that clearly would melt and refreeze, depending on the weather conditions.

Plaintiff responded to defendant's motion to dismiss arguing that defendant's performance under its contract increased the danger to plaintiff by creating a new hazard. Specifically, according to the terms of its contract, defendant was supposed to plow the snow to

¹ Because plaintiff Raymond Mierzejewski's consortium claim is derivative, we refer to Linda Mierzejewski as "plaintiff."

the outer perimeter of the parking lots “in a manner as not to interfere with parking or roadways.” Instead, defendant plowed snow so that it was piled on landscaped curbed islands in the parking lot, which created a new hazard because of the melting and refreezing that would occur in and around these areas. Plaintiff also argued that the open and obvious doctrine did not apply because this was not a premises liability claim. The trial court disagreed with plaintiff and summarily dismissed the case on the ground that the purported hazard was open and obvious.

On appeal, plaintiff first argues that the open and obvious doctrine does not apply because this is not a premises liability case. In its brief on appeal, defendant agrees. We also agree with plaintiff. Because defendant neither owned nor possessed the property where plaintiff fell, any duty defendant owed to plaintiff would not be relieved by application of this doctrine. See, e.g., *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517; 629 NW2d 384 (2001). Plaintiff’s complaint is not that defendant allowed a dangerous condition to exist on the property; rather, plaintiff’s complaint is that defendant created the dangerous condition by its negligent snowplowing. Accordingly, the trial court’s grant of summary disposition in defendant’s favor on the ground that the allegedly dangerous condition was open and obvious was erroneous. See *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

However, we may affirm the trial court’s decision to dismiss a case for a different reason. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998). Because plaintiff was not a party to the snow removal contract, she was not owed a duty under it. But, plaintiff argues that defendant’s duty to her did not arise from its contract with her employer to remove the snow in the parking lot where she parked her vehicle. Instead, plaintiff claims, consistent with *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), defendant violated a duty owed to her that was separate and distinct from defendant’s contractual obligations. “The duty allegedly owing is that which accompanies every contract, a common-law duty to perform with ordinary care the things agreed to be done.” *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 707-708; 532 NW2d 186 (1995), overruled in part on other grounds, *Smith, supra* at 455-456 n 2. In other words, she was foreseeably injured by defendant’s negligent performance of the snow removal contract; thus, she was owed a duty of care. See *id.* at 708.

More specifically, plaintiff claims that defendant performed its contractual obligation in such a way that it created a new hazard and increased the danger to plaintiff. See *Fultz, supra* at 469. The purported new hazard was the snow defendant piled on the landscaped curbed islands located in or around the parking lot because it caused run-off when the snow melted and then froze into puddles in areas where people had to walk from their vehicles into work. This alleged hazard is quite similar to the hazard complained of in *Osman, supra* at 704. In that case, the hazard was the placement of the removed snow “on a portion of the premises when it knew, or should have been known or anticipated, that the snow would melt and freeze into ice on the abutting sidewalk, steps, and walkway, thus posing a dangerous and hazardous condition to individuals who traverse those areas.” *Id.*

The issue here, however, is whether defendant owed a duty to plaintiff under the circumstances presented and we conclude that it did owe such a duty. A duty of care arose by operation of law when defendant actually performed the snow removal services and the duty was “to perform with ordinary care the thing agreed to be done.” *Fultz, supra* at 465, quoting *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). That duty of care was “owed by the

defendant to the public, of which the plaintiff is a part.” *Fultz, supra* quoting *Clark, supra*. And, that duty of care was allegedly breached when defendant created a new hazard which ultimately and foreseeably caused plaintiff to fall and sustain injuries. Accordingly, the trial court’s summary dismissal of this matter on the ground that defendant did not owe a duty to plaintiff must be reversed. We express no opinion on the issue whether defendant breached its duty of care.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Patrick M. Meter